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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE CAPITAL CITIES/ABC, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Congress's Minority Preference Policies on Broadcast Station Ownership Are Based on a Compelling Need to Overcome the Adverse Consequences that Societal Discrimination Has Had on Minority Ownership and, Therefore, on Diversity of Broadcasting Viewpoints	5
A. Congress Has Mandated These Programs by Law	5
B. The Minority Preference Policies Are Supported by Both Diversity and Remedial Interests Operating in Conjunction	7
II. There Is a Substantial Nexus Between the Goal of Increasing Viewpoint Diversity and Minority Ownership Preferences	16
III. The Minority Ownership Preferences Constitute a Narrowly Tailored Means of Achieving Congress's Legitimate Goals	20
A. Ownership-Focused Minority Preferences Are a More Effective Means than Race-Neutral Alternatives Available to Congress and the FCC	22
B. The Minority Ownership Preferences at Issue Represent the Least Burdensome Means of Achieving Congress's Goals	23
C. The Minority Preferences Here Are Not Overinclusive	25
D. The Comparative Minority Preferences Are Administered in a Careful and Flexible Manner	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Associated Press v. United States, 326 U.S. 1 (1945) — 15

Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976) — 23

Berryville Broadcasting Co., 70 F.C.C.2d 1 (Rev. Bd. 1978) — 27

City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) — passim

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) — 8, 10, 15

Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982) — 8, 12, 26

FCC v. League of Women Voters, 468 U.S. 364 (1984) — 8, 15

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) — 8, 15, 19, 24

Fullilove v. Klutznick, 448 U.S. 448 (1980) — passim

Henderson Broadcasting Co., 63 F.C.C.2d 419 (Rev. Bd. 1977) — 27

Hispanic Owners, Inc., 99 F.C.C.2d 1180 (Rev. Bd. 1978) — 27

KFKB Broadcasting Association v. Federal Radio Commission, 47 F.2d 670 (D.C. Cir. 1931) — 15

KIST Corp., 99 F.C.C.2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 F.C.C.2d 288 (1985), *aff'd sub nom. United American Telecasters v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986) — 27

Linda Crook, 3 FCC Rcd. 354 (1988) — 29

Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986) — 23

Magdeline Gunden Partnership, 3 FCC Rcd. 488 (Rev. Bd. 1988) — 27

Metro Broadcasting, Inc., 3 FCC Rcd. 866 (1988), *aff'd sub nom. Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989) — 6

Mid-Florida Television Corp., 60 F.C.C.2d 607 (Rev. Bd. 1978) — 5

NAACP v. FPC, 425 U.S. 662 (1976) — 13

TABLE OF AUTHORITIES—Continued

Page

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) — 3, 15, 16

National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) — 21

New Continental Broadcasting Co., 88 F.C.C.2d 830 (Rev. Bd. 1981), *remanded on other grounds*, 93 F.C.C.2d 1275 (1983) — 28

Newton Television Limited, 3 FCC Rcd. 553 (Rev. Bd. 1988) — 27

Nondiscrimination in Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240 (1969) — 22

Northhampton Media Associates, 3 FCC Rcd. 5164 (Rev. Bd. 1988) — 27

Pacific Television, Ltd., 2 FCC Rcd. 1101 (Rev. Bd. 1987) — 27

Pacifica Foundation, 59 F.C.C.2d 892 (1976) — 8, 27

Payne Communications, Inc., 1 FCC Rcd. 1052 (Rev. Bd. 1986) — 27

Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766 (1968) — 22

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) — 19, 28

Radio Jonesboro, Inc., 100 F.C.C.2d 941 (1985) — 29

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) — 3, 8, 24

Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 FCC Rcd. 1315 (1986), *modified*, 2 FCC Rcd. 2377 (1987) — 6, 9, 13

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) — passim

Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829 (1989) — 8

Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 715 (1990) — passim

TABLE OF AUTHORITIES—Continued

	Page
Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978)	5, 9, 18, 23
Susan S. Mulkey, 3 FCC Rcd. 590 (Rev. Bd. 1988)	27
Tulsa Broadcasting Group, 2 FCC Rcd. 6124 (Rev. Bd. 1987)	27
TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 986 (1974)	18, 30
Washoe Shoshone Broadcasting, 3 FCC Rcd. 3948 (Rev. Bd. 1988)	27
West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)	29
Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted in part sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 715 (1990)	6
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986)	*passim*
STATUTES	
26 U.S.C. § 1071 (1982)	2, 5
Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1982 & Supp. 1987)	8
Communications Amendments Act of 1982, Pub. L. 97-259, 96 Stat. 1087 (codified at 47 U.S.C. § 309) (1982)	7
Continuing Appropriations, Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329 (1987)	6
Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, 102 Stat. 2186 (1988)	6
Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 988 (1989)	6
REGULATIONS	
47 C.F.R. § 73.3555 (1989)	23

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS	Page
133 Cong. Rec. S14395 (daily ed. Oct. 15, 1987)	17
134 Cong. Rec. S10021 (daily ed. July 27, 1988)	17
H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. (1982)	7, 11, 17
S. Rep. No. 182, 100th Cong., 1st Sess. (1987)	17
Hearings on S. 98 Before a Subcommittee of the Senate Committee on Appropriations, 100th Cong., 1st Sess. (1987)	17
Testimony of Roy M. Huhndorf, Chairman, Cook Inlet Region, Inc. Before the Senate Subcommittee on Telecommunications (Sept. 15, 1989)	12, 13, 20, 24
MISCELLANEOUS AUTHORITIES	
Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, *Final Report to the Federal Communications Commission* (1982)	2, 12
39 FCC Annual Report/Fiscal Year 1973	11
Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises*	12
Congressional Research Service, *Statistical Analysis of FCC Survey Data re: Minority Broadcast Station Ownership and Minority Broadcasting* (1988)	12, 22
Minority Ownership Taskforce Report, *Minority Ownership in Broadcasting* (May 17, 1978)	12, 13, 22
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Proceedings from the Tenth Annual Telecommunications Policy Research Conference (1983)	20
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TABLE OF AUTHORITIES—Continued

	Page
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INTEREST OF AMICUS CURIAE

Capital Cities/ABC, Inc. is the licensee and owner of a number of radio and television broadcast stations, a television network and several radio networks. Among the broadcast stations affiliated with Capital Cities/ABC's networks are several owned and controlled by individuals of minority race.[1]

* Written consent to the filing of this brief has been obtained from counsel for all parties. Copies of the letters of consent have been filed with the Clerk of this Court.

[1] In 1986, 3 of the 21 television stations in the United States owned or controlled by blacks were ABC affiliates. 4 of the 6 television stations owned or controlled by Asian-Americans were ABC affiliates. 1 of the 8 television stations owned or controlled by Hispanics, and 1 of the 3 television stations owned or controlled by Native Americans, were ABC affiliates. National Association of Broadcasters, *Minority Broadcasting Facts* at 9-10 (Sept. 1986).

On its own initiative, Capital Cities/ABC has sought to assist minorities to become successful owners of broadcast stations. Capital Cities Communications, Inc. acted as mentor to Seaway Communications, Inc., a company created by a number of black professional and business men and women in 1977 with $1 million of personal capital, in which Capital Cities has no stock ownership or management position. Capital Cities provided counsel to Seaway in examining and analyzing available television properties. Ultimately, on April 24, 1979, Seaway received the approval of the Federal Communications Commission ("FCC") to acquire 100 percent of the stock of Northland Television, Inc., licensee of WAEO-TV, Channel 12 (NBC), Rhinelander, Wisconsin, in the first application of the FCC's distress sale policy, which had been adopted in the previous year. This was also the first instance in which the FCC had ever granted an operating license for a network-affiliated VHF television station to a 100 percent minority-owned company.[2] Seaway has, since that time, not only continued to operate its Rhinelander station but has acquired a television station in Bangor, Maine, WVII-TV.

Capital Cities/ABC also has direct experience with the tax certificate policy. When Capital Cities/ABC was formed in 1986, it transferred to minority-owned or controlled purchasers three broadcast stations—WTNH (TV) (New Haven, Connecticut), WKBW-TV (Buffalo, New York), and WRIF (FM) (Detroit, Michigan)—as well as cable television systems in Michigan. The FCC approved the issuance of tax certificates under 26 U.S.C. § 1071 to these minority purchasers. The tax certificate policy here played a significant role in bringing more minority owners into broadcasting.

Capital Cities/ABC believes, based on its extensive experience in the broadcasting industry and in dealing

[2] *See* Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, *Final Report to the Federal Communications Commission* at 31 (1982) ("*Advisory Committee Report*").

with its own minority-owned affiliates, that policies preferring minorities for ownership of newly allocated or voluntarily transferred broadcast stations are on the whole beneficial to the industry, and contribute substantially to greater diversity of viewpoints in broadcasting. The federal government's efforts to bring more minority viewpoints to the airwaves by increasing minority ownership are, in our view, far preferable to direct regulatory intervention in programming judgments, avoiding intrusion on broadcasters' First Amendment liberties. These policies should be continued, and the shadow over their constitutionality lifted by this Court.

SUMMARY OF ARGUMENT

Congress, for the past three years, has commanded the Federal Communications Commission by law to maintain and apply minority ownership preferences in broadcast licensing. Thus, in considering the constitutionality of the comparative hearing preference, this Court should accord the same high degree of deference that is due to any act of Congress on the sensitive subject of affirmative action, and was accorded in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Deference to Congress is particularly important in regulation of broadcasting, an industry that is unique both because of its pervasive role in informing Americans, and because of its special status as a government-licensed medium. The FCC presides over the licensing and relicensing of a limited number of broadcast frequencies. In doing so, it must select licensees who will best serve the "public interest." This regulatory scheme has long been recognized and approved by this Court. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). First Amendment considerations strongly support the policy of seeking diversity in station ownership rather than interfering directly in programming decisions.

Congress's minority preference policies are supported by the dual objectives of increasing diversity of view-

points in broadcasting, and overcoming the historic barriers to minority entry in broadcasting that are attributable to longstanding societal discrimination. These objectives are intertwined and together establish the "compelling interest" called for by *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989). Congress's conclusion that there is a nexus between increasing minority ownership and fulfilling these legitimate objectives represents a predictive judgment well within the legislative capacity and consistent with traditional broadcast regulation. Finally, the comparative hearing preference is more effective than race-neutral alternatives that have been considered, is not unduly burdensome on nonminorities, and is carefully administered to ensure against abuses; it is therefore "narrowly tailored" and should be upheld under this Court's precedents, including *Croson*.

ARGUMENT

Broadcasting is unique among American institutions in its ability to inform the public. It is also unique because the federal government plays a crucial role in distributing the limited number of broadcast licenses that are available, under a statutory and regulatory framework repeatedly upheld by this Court. Thus, Congress has determined that the limited representation of the diverse viewpoints of racial minorities in broadcasting, in large part the result of historic societal discrimination and the lasting burdens such discrimination still imposes on minorities today, calls for a response by government. Congress and the FCC have sought to increase the representation of minority viewpoints on the airwaves through specific policies targeted at increasing minority ownership in broadcasting.

This Court, in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), has reaffirmed that race-conscious programs to benefit minorities are not constitutionally invalid *per se*, *id.* at 720, 729 (opinion of O'Connor, J.), 730 (Stevens, J., concurring in part and concurring in the judgment), 734 (Kennedy, J., concurring in part

and concurring in the judgment), while at the same time holding that such programs—at least where initiated by state or local governments—must both satisfy a "compelling interest" and be "narrowly tailored." *See id.* at 723-29. Here, Congress is well within its constitutional authority in requiring the FCC to take account of race in its efforts to encourage minority ownership in broadcasting.

I. Congress's Minority Preference Policies on Broadcast Station Ownership Are Based on a Compelling Need to Overcome the Adverse Consequences that Societal Discrimination Has Had on Minority Ownership and, Therefore, on Diversity of Broadcasting Viewpoints

A. *Congress Has Mandated These Programs by Law*

The minority preference policies at issue, though originally created and still implemented by the FCC, are now clearly Congress's policies, having been mandated continuously for several years through specific legislation. In 1987, responding to the possibility that the FCC might abolish its minority preferences, Congress directed:

> "That none of the funds appropriated by this Act [Continuing Appropriations, Fiscal Year 1988] shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 60 F.C.C. 2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings which were suspended pending the conclusion of the inquiry;" [3]

[3] Pub. L. 100-202, 101 Stat. 1329, 31-32 (1987).

The same language has been reenacted each year to the present.[4] Congress has thus affirmatively commanded the FCC to maintain and carry out each of the three minority preference policies it specifically identified in the legislation, including comparative enhancements and distress sales. The FCC has expressly recognized that its decision to reinstate the comparative enhancement, distress sale and tax certificate policies, and to terminate its proceeding reconsidering them,[5] was taken in order to comply with this legislation.[6] Majorities of both panels of the D.C. Circuit below similarly recognized that these policies are congressionally mandated.[7]

Congress's repeated direction to the FCC to maintain the minority ownership preferences at issue is but the latest reflection of its continuing support for race-conscious efforts to aid minority broadcast ownership. In the Communications Amendments Act of 1982, authorizing the FCC to select certain new station licensees by lottery, Congress specifically directed that "significant preferences" be granted to any lottery applicants "the

[4] *See* Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100-459, 102 Stat. 2186, 2216-17 (1988); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101-162, 103 Stat. 988, 1020-21 (1989).

[5] *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd. 1315 (1986), *modified*, 2 FCC Rcd. 2377 (1987) ("*Race and Gender Preference*").

[6] *Metro Broadcasting, Inc.*, 3 FCC Rcd. 866 (1988), *aff'd sub nom. Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

[7] *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), *cert. granted in part sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990); *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 932 (MacKinnon, J., concurring in judgment), 938 (Wald, C.J., dissenting) (D.C. Cir. 1989), *cert. granted sub nom. Astroline Communications Co. Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 715 (1990).

grant to which of the license or permit would increase the diversification of ownership of the media of mass communications," and that "[t]o further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group."[8] Because Congress in that instance was enacting a preference as part of a new mechanism for distributing licenses, rather than maintaining preferences in existing areas, it dealt more fully with the rationale for race-conscious efforts to encourage minority ownership. Its analysis of the need for a race-conscious policy, as discussed below, is equally applicable to the preferences at issue here: indeed, in the legislative history Congress repeatedly referred to the statements by the FCC and the courts in support of the existing preferences as part of the basis for the new one it was creating.[9]

B. *The Minority Preference Policies Are Supported by Both Diversity and Remedial Interests Operating in Conjunction*

The opponents of minority ownership preferences seek to create a false dichotomy between the remedial and diversity objectives underlying these programs. While they argue that neither alone is sufficient to establish a "compelling need,"[10] they fail to consider that the two objectives are in fact intertwined. Congress well understood this point, as the legislative history demonstrates. The aims of remedying societal discrimination and promoting viewpoint diversity support one another, and together establish the requisite need for race-conscious remedies here.

[8] Communications Amendments Act of 1982, Pub. L. 97-259, § 115, 96 Stat. 1087, 1094 (1982) (codified at 47 U.S.C. § 309(i)(3)(A)).

[9] H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. at 40-44 (1982).

[10] *See, e.g., Shurberg*, 876 F.2d at 912-15, 919-25 (opinion of Silberman, J.); Brief for the United States as Amicus Curiae Supporting Petitioner at 17-29.

This unusual conjunction of remedial and forward-looking aims arises because of the very special characteristics of broadcasting, which enjoys a unique status as a government-licensed medium of communications as well as a unique ability to inform the viewpoints and perspectives of the American public.[11] Indeed, this Court has acknowledged the "uniquely pervasive" influence of broadcasting on American society. *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2837 (1989), *quoting Pacifica Foundation*, 59 F.C.C.2d 892 (1976).

That influence gives rise to a need for a plurality of voices on the airwaves, as this Court also has long acknowledged. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). In light of these concerns of constitutional dimension, broadcasters occupy the status of public trustees under the Communications Act of 1934, 47 U.S.C. § 151 *et seq. See FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984). And Congress has long reposed considerable discretion in the FCC to ensure that the unique diversity goals of broadcast licensing under the Communications Act are met. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978). Because of the complex balancing of First Amendment interests necessary in broadcasting, this Court affords "great weight" to the judgments of Congress as well as the experience of the FCC. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

The FCC has "traditionally considered the underrepresentation of minority points of view over the airwaves

[11] Radio and television penetrate virtually all American homes; some 99% of households have radio sets and 98% have television sets. Radio Advertising Bureau, *Radio Facts 1986-87* at 3; 57 *Television & Cable Factbook (Cable & Services Volume)* at C-331 (1989).

as detrimental to minorities and the general public," and it adopted the minority ownership preferences now mandated by Congress with the intent of increasing diversity of viewpoints through increasing diversity of ownership.[12] Bringing more minority viewpoints into broadcasting, the FCC has found, would serve both statutory and constitutional goals:

> "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." [13]

Justice Stevens' conclusion in *Croson* that "the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future," 109 S. Ct. at 730 (Stevens, J., concurring in part and dissenting in part), is particularly pertinent in the area of broadcasting, which plays such a central role in informing the views of Americans on public issues, including the continuing controversies over race and the role of minorities in our society.

While the FCC's justification for minority ownership preferences was essentially forward-looking, stressing the

[12] *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 849-50 (1982) (*"1982 Policy Statement"*). The FCC has also characterized its goal as "expand[ing] program diversity"; however, it appears that this term does not represent a separate and distinct objective, but is used interchangeably with "viewpoint diversity." *See, e.g., Race and Gender Preferences*, 1 FCC Rcd. at 1317. The FCC is concerned —rightly—not with some arbitrary quantity of entertainment programming, but with the more subtle, and far more important, benefits to be had from a presentation of minority views, perspectives and opinions by minorities themselves, not through a sieve of white editors and programmers.

[13] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) (*"1978 Policy Statement"*).

benefits to be realized both by minorities and by the public generally from viewpoint diversity, the need for a race-conscious ownership policy in this area arises because this nation's regrettable history of societal discrimination against minorities has had a discernible impact on the broadcasting industry. Congress's decision to extend the mantle of its own authority to the minority preferences at issue is crucial because Congress, unlike any state or political subdivision, has the power to "identify and redress the effects of society-wide discrimination." *Croson*, 109 S. Ct. at 719 (opinion of O'Connor, J.). *See also Fullilove v. Kutznick*, 448 U.S. 448, 499 (1980) (opinion of Powell, J.) ("Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society.").[14]

Congress's choice of responses to the problem of discrimination must be accorded "great weight." *Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J.), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. Congress's power to deal with the effects of past discrimination as perpetuated in the present, *see Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.), need not be exercised in a color-blind fashion, for "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress." *Id.* at 482-83.

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[14] The Department of Justice, in contending that generalized societal discrimination is not sufficient to sustain a minority preference program, Brief for the United States as Amicus Curiae Supporting Petitioner at 21-22, conveniently ignores the above language in *Croson* and *Fullilove*, relying instead on Justice Powell's statements in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.), where the power of Congress was in no way implicated.

Because of Congress's crucial role in authorizing the minority preferences at issue, there is no need to consider what power the FCC would have had to implement such a program entirely on its own.

In enacting the minority preference for license lotteries, Congress was well aware that racial minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties."[15] Thus, Congress in creating the lottery preference meant to ensure that "minorit[ies] . . . that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so."[16] That underrepresentation is directly attributable to past discrimination. In the Conference Report on the lottery legislation, Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well."[17] Thus, Congress conceived of the lottery preference as a means of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications,"[18] and its reasoning is equally applicable to the preferences at issue here.

At the time most broadcast licenses were granted, including those in the most valuable markets, overt discrimination against racial minorities was unquestionably commonplace in our society.[19] While one need not accept as true everything that has been said about the effects of

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[15] H.R. Conf. Rep. No. 765 at 43.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 44.

[19] *See* Brief for Federal Communications Commission at 30 in *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700. As of mid-1973, licenses for 66.6% of the commercial television stations—and 91.4% of the VHF stations—that existed in mid-1989 had already been awarded. 68.5% of the AM and FM radio station licenses authorized by the FCC as of mid-1989 had already been issued by mid-1973, including 85% of the AM stations. *See* 39 FCC Ann. Rep./Fiscal Year 1973 at 194, 197.

discrimination in broadcasting,[20] it would be blinking reality to suppose that there was no such effect. Minority ownership in broadcasting is still but a tenth of minority representation in the population.[21] This glaring disparity cannot be dismissed as some hypothetical aversion of minorities to the broadcasting business, for minority business ownership is similarly low throughout the American economy.[22] Rather, the evidence is conclusive that minority entry into broadcasting has been frustrated by very limited access to financing,[23] and this in turn is traceable to the continuing effects of our legacy of societal

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[20] *See, e.g.*, O. Kerner, *Report of the National Advisory Commission on Civil Disorders* at 201-12 (1968); United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing on the Set: An Update* (1979).

[21] Minorities constitute some 23% of the population of the United States, yet, as of 1986, they owned just over 2% of the nation's radio and television stations. *See* National Association of Broadcasters, *Minority Broadcasting Facts* at 6. Even the most optimistic recent assessment places minority ownership at no more than 3.5% of the total broadcast stations. Congressional Research Service, *Statistical Analysis of FCC Survey Data re: Minority Broadcast Station Ownership and Minority Broadcasting* at 42 (1988) (*"CRS Report"*). Moreover, these quantitative statistics do not take into account the limited markets served by most minority broadcasters, as late entrants who usually have been able to obtain only the less valuable stations.

[22] According to data published in 1982 by the Census Bureau, of the total number of businesses in the United States, blacks owned 2.3%, Hispanics 1.7%, and Asian-Americans 1.76%—all well below their representation in the population. Bureau of the Census, *1982 Survey of Minority-Owned Business Enterprises*, MB 82-1 at 90, MB82-2 at 197-99, MB82-3 at 221-23.

[23] "[T]he pressing dilemma minority entrepreneurs face" is the "lack of available financing to capitalize their telecommunications ventures." *1982 Policy Statement*, 92 F.C.C.2d at 856. *See, e.g.*, Minority Ownership Taskforce Report, *Minority Ownership in Broadcasting* at 11-12 (May 17, 1978) (*"Taskforce Report"*); *Advisory Committee Report* at i, 9, 19, 25; Testimony of Roy M. Huhndorf, Chairman, Cook Inlet Region, Inc. Before the Senate Subcommittee on Telecommunications at 10 (Sept. 15, 1989) (*"Cook Inlet Testimony"*) (discussing how tax certificate policy vital to acquisition of broadcast station by corporations owned by Alaskan Natives).

discrimination.[24] Here, the Court is not confronted with a general policy of handing out broadcast licenses arbitrarily to various ethnic groups on the basis of "diversity" alone. Rather, Congress has made a focused decision to increase viewpoint diversity by aiding members of minority groups, which have been discriminatorily excluded from the mainstream of American society, to enter into broadcasting.

Those who contend that diversity can play no part in justifying a preference for minority ownership in broadcasting ignore this Court's leading decisions, as well as the great weight due to Congress's judgments. The FCC has found the diversity interest in this area to be "compelling," [25] and Congress, as the legislative record demonstrates, is in agreement. Those conclusions cannot be ignored, in light of this Court's own observation, in *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976), that the FCC's equal employment opportunity regulations are supported by the FCC's "obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."

The validity of using a race-conscious program to achieve diversity of viewpoints also finds direct support in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), where five members of this Court agreed that a color-blind medical school admissions policy was not required and reversed the district court's injunction to that effect. Since there was no showing that the University or the medical school had engaged in racial discrimination, and the Regents had no power to remedy societal discrimination, *id.* at 305, 310 (opinion of Powell, J.), *Bakke* must rest on the

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[24] *See, e.g., Taskforce Report* at 7-8; *Cook Inlet Testimony* at 13.

[25] *Race and Gender Preferences*, 1 FCC Rcd. at 1317.

conclusion that a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious program may be predicated. *Id.* at 311-13 (opinion of Powell, J.).

While the Court has yet to uphold a race-conscious program specifically on the basis of viewpoint diversity, the Court's other constitutional affirmative action cases, typically involving employment programs or set-asides in government contracting, to date have afforded no real opportunity to do so.[26] Moreover, this Court has never ruled out justifying race-conscious programs on grounds other than remedying past discrimination.[27]

The diversity goal in *Bakke* was supported by the substantial First Amendment interest in academic freedom.

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[26] Viewpoint diversity, as a basis for a race-conscious program, should not be confused with the now-discredited "role model" argument for affirmative action, *see Croson*, 109 S. Ct. at 723 (opinion of O'Connor, J.). The Court's rejection of the "role model" theory reflects a concern that race-conscious programs not be implemented throughout American society on the basis of statistical disparities alone, *id.*, whereas the diversity rationale is particularly appropriate to a governmentally licensed regime in which a central obligation is to ensure the free interchange of ideas and dissemination of views.

[27] *See, e.g., Croson*, 109 S. Ct. at 730 (Stevens, J., concurring in part and dissenting in part) ("I . . . do not agree . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong"), 744-45 (Marshall, J., joined by Brennan, J. and Blackmun, J., dissenting) ("[t]he more government bestows its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination, the tighter the deadhand grip of prior discrimination becomes on the present and future"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 287 (O'Connor, J., concurring in part and concurring in the judgment) ("although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest . . . . certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests . . . to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies").

438 U.S. at 312 (opinion of Powell, J.). In the area of broadcasting, the First Amendment concerns supporting viewpoint diversity operate with, if anything, greater force. "[T]he 'public interest' standard necessarily invites reference to First Amendment principles," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 795, *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 122, while the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The public has a First Amendment interest in receiving a "balanced presentation" of views on diverse matters of public concern. *FCC v. League of Women Voters*, 468 U.S. at 385.

The First Amendment interest in diversity is particularly relevant to the regulation of the broadcasting industry by Congress and the FCC because it is well established that the government's role in distributing a limited number of broadcast licenses is not merely that of a "traffic officer." *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-16 (1943). Rather, from the first days of the Communications Act and earlier, the system of broadcast regulation in this country has been predicated on advancing the "public interest,"[28] and Congress has accorded the FCC responsibility for "determining the composition" of traffic on the spectrum as

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[28] "The ether is a public medium, and its use must be for public benefit. The use of radio channel is justified only if there is public benefit." Secretary of Commerce Herbert Hoover, *Proceedings of the Fourth National Radio Conference, Washington, D.C.*, Nov. 9-11, 1925 (Washington, D.C.: Government Printing Office, 1976) at 7. As the courts have held from the inception of spectrum regulation, broadcasting "is impressed with a public interest and . . . because the number of available broadcasting frequencies is limited, the [Radio Commission] is necessarily called upon to consider the character and quality of the service to be rendered." *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

well as supervising its orderly flow. *National Broadcasting Co.*, 319 U.S. at 215-16. In light of the unique characteristics of this industry, a decision by this Court recognizing the special importance of promoting diversity of viewpoint in broadcasting through minority ownership preferences would hardly operate as a wholesale invitation to the adoption of race-conscious programs throughout American society.

Finally, there is no risk that minority preferences in broadcast ownership will result in the sort of stigmatization that concerned several members of the Court in *Croson*, 109 S. Ct. at 712 (opinion of O'Connor, J.), prompting their insistence that only remedial objectives could justify the race-conscious set-asides at issue there. Whatever the risk of stigma in employment or contracting decisions, where selection is based in substantial part upon an evaluation of individual merit—and minority set-asides or other race-conscious programs might be taken by some to imply that minorities are not as capable as whites—stigmatization concerns are irrelevant to entry-oriented *ownership* policies such as these. The minority preferences Congress has mandated are predicated on minorities' relative lack of access to purchase and start-up financing compared with whites, a situation which is in turn the consequence of societal discrimination. The test of a broadcaster's real capabilities and skills comes not at initial entry but in actual operation in the marketplace, and in that contest all broadcasters, minorities as well as whites, stand on an equal footing; who thrives or fails is not a concern of Congress or the FCC.

II. There Is a Substantial Nexus Between the Goal of Increasing Viewpoint Diversity and Minority Ownership Preferences

Congress, the courts and the FCC have all concluded that a nexus exists between the compelling need to remedy the lack of minority viewpoints in broadcasting, and the minority ownership preference policies at issue. In

enacting the lottery preference policy in 1982, Congress clearly recognized that there is a nexus between diversity of media ownership and viewpoint diversity.[29] Similarly, the report of the Senate Appropriations Committee on the legislation commanding the very policies at issue states that "[d]iversity of ownership results in diversity of programming and improved service to minority and women audiences," and refers for further support to the earlier enactment of the lottery preference.[30] Congress is under no obligation to compile a more detailed record or make findings as in administrative or legal proceedings. *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.), 502 (opinion of Powell, J.). The Department of Justice's approach, while pretending deference to Congress, would in fact treat the national legislature as little better than a district court or regulatory agency.[31]

This Court is entitled to consider the "total contemporary record" available to Congress, *Fullilove*, 448 U.S. at 503 (opinion of Powell, J.), in assessing the basis for

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[29] H.R. Conf. Rep. No. 765 at 40.

[30] S. Rep. No. 182, 100th Cong., 1st Sess. at 76-77 (1987). *Accord* 133 Cong. Rec. S14395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). In debates on the appropriations legislation for fiscal year 1989, continuing the requirement of the minority preference policies, Senator Hollings further elaborated on the existence of a "nexus between minority/female ownership and program diversity." 134 Cong. Rec. S10021 (daily ed. July 27, 1988) (statement of Sen. Hollings). Senator Hollings offered as evidence of that nexus a report by the Congressional Research Service which examined data obtained by the FCC from broadcasters, and, as Senator Hollings concluded, demonstrated that "minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." *Id.* Earlier, Senator Lautenberg had also recognized in hearings on the fiscal year 1988 legislation that minority-owned stations "serve a very important need to express a particular viewpoint," and observed that diversity of views, backgrounds and interests could be effectively promoted through increasing minority ownership. Hearings on S. 98 Before a Subcommittee of the Senate Committee on Appropriations, 100th Cong., 1st Sess. 17 (1987).

[31] *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 13-16.

its decision to mandate minority preferences in broadcast ownership. Here, the legislative history demonstrates that Congress was well aware of the prior proceedings in the courts and before the FCC, and that evidence lends additional weight to Congress's judgment. The D.C. Circuit, in *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), had concluded that minority ownership should be given weight in the comparative hearing process in light of the "connection between diversity of ownership of the mass media and diversity of ideas and expressio required by the First Amendment." Likewise, the FC had found that "[f]ull minority participation in the ow rship and management of broadcast facilities results i a more diverse selection of programming." [32] The tota body of evidence here is substantial, as was the evidence Congress had before it in enacting the minority business enterprise set-asides upheld in *Fullilove*. *See* 448 U.S. at 478 (opinion of Burger, C.J.), 503-06 (opinion of Powell, J.).

The conclusion reached by Congress, and earlier by the courts and the FCC, that greater minority ownership is likely to lead to greater viewpoint diversity, represents a predictive judgment about the overall result of minority entry into broadcasting, not a stereotyped assumption of how mi rity owners will behave in every case, as Chief Judge Wald has recognized.[33] Such a predictive judgment is legitimate, as was Justice Powell's belief in *Bakke* that greater admission of minorities would, on average, contribute to a more active exchange of views and learning, *see* 438 U.S. at 312-13 & n.48, even though not every individual of minority race would necessarily make a contribution. While minority station owners may well be guided as much as whites by market demand in their choice of entertainment programming, it is reasonable for Congress to conclude that there will be differences in the more important matters of presentation of news, edi-

[32] *1978 Policy Statement*, 68 F.C.C.2d at 981.

[33] *Shurberg*, 876 F.2d at 944-45 (Wald, C.J., dissenting).

torial viewpoint and opinion, particularly on questions affecting minority owners as minorities. Conclusive proof of this proposition may well be neither practical nor desirable, in light of the First Amendment's restraints on direct governmental supervision of broadcasters' editorial judgments. But it would ill accord with the deference owed to Congress for the Court to rule that this judgment lies beyond Congress's power to make.

These minority preferences do not represent a novel departure, but readily fit within the overall framework of broadcast regulation. The finding of a nexus between viewpoint and ownership is consistent with the FCC's general assumption behind its multiple ownership policies —repeatedly sustained by the courts—that, on average, greater viewpoint diversity will occur through diffusion of ownership. *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 780. Minority preferences are also consistent with the governing assumption of the FCC's comparative licensing process that factors other than money and market forces—for example, integration of ownership and management, local residence, and civic participation—are all likely to affect a broadcaster's service to the community. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394-400 (1965).

There is no plausible basis for distinguishing the significance of the diversity interest in the academic context from that presented here, as some opponents of these programs have sought to do.[34] For what matters is the diversity of the viewpoints themselves, and not necessarily whether they are identified to the public as those of a minority individual—although, quite often, citizens are aware of who owns the broadcast stations in their community. The minority ownership preferences cannot be dismissed as aiding only a handful of wealthy entrepreneurs. Their direct beneficiaries are, of course, dis-

[34] *See, e.g.*, Brief of Galaxy Communications, Inc. as Amicus Curiae in Support of Petitioner at 7-8.

crete individuals, but there is clear evidence that those individuals have a broader effect on the stations they own. In particular, there is a strong correlation between minority ownership of a broadcast station and employment of minorities in managerial and other important roles that can directly influence station policies.[35] Moreover, it should be self-evident, even absent any specific finding, that both minority and non-minority station employees will work with an eye to the characteristics of the station owner, and will be more sensitive to minority perspectives and concerns when they are accountable to a minority individual for their conduct. Not only in employment does ownership make a difference; in the broadcast industry, station owners frequently interact with advertisers and program suppliers (including networks) and others who affect the content of the material that is aired.

III. The Minority Ownership Preferences Constitute a Narrowly Tailored Means of Achieving Congress's Legitimate Goals

The Department of Justice's argument that deference is due only to Congress's assessment of compelling need,

[35] For example, black-owned radio stations have hired blacks in top management and other important job categories at far higher rates than have white-owned stations, even those with black-oriented formats. The same has proven true of hiring of Hispanics at Hispanic-owned stations, compared to Anglo-owned stations with Spanish-language formats. *Proceedings from the Tenth Annual Telecommunications Policy Research Conference* at 88-89 (1983). As of September 1986, half of the 14 black or Hispanic general managers of TV stations in the United States worked at minority-owned or controlled stations. National Association of Broadcasters, *Minority Broadcasting Facts* at 9-10, 55-57. In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic managers, and 42% of the Anglo-owned stations had no Hispanic managers at all. Schement & Singleton, *The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio*, 31(2) J. Comm. 78, 80-81 (1981). The success of minority-owned stations in minority hiring owes much to their deliberate efforts. *See, e.g., Cook Inlet Testimony* at 7-8, 11-12.

but not to Congress's choice of remedy,[36] flies in the face of this Court's recognition in *Fullilove* that "'[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power,'" 448 U.S. at 480 (opinion of Burger, C.J.), *quoting National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.). Congress enjoys "discretion to choose a suitable remedy for the redress of racial discrimination," and is not "limited to the least restrictive means of implementation." *Fullilove*, 448 U.S. at 508 (opinion of Powell, J.). Here, Congress's choice of minority ownership preferences to meet a compelling need for viewpoint diversity in broadcasting is well within the bounds of reasonable discretion.

The enhancements given to minority applicants in comparative hearings clearly satisfy the Court's "narrowly tailored" requirement. They represent a direct means of overcoming minorities' lack of financial resources by awarding new station licenses for which no payment is demanded. They have brought minority owners into broadcasting to an extent that race-neutral alternatives cannot match, and without unduly burdening non-minorities. However, only a limited number of new stations are available, and those are often in less desirable markets or on less desirable spectrum (*e.g.*, UHF).[37] Because most acquisitions must continue to be by purchase of existing stations, Congress has also found a need for the distress sale and tax certificate policies, which function as partial subsidies to minority purchasers. While we do not address those policies separately, Capital Cities/ABC's own experience in assisting Seaway Communications and in sales of stations to minorities involving tax certificates, *see supra* at 2, demonstrates the important role that these other minority preferences can play.

[36] Brief for the United States as Amicus Curiae Supporting Petitioner at 15.

[37] *See supra* note 19.

A. *Ownership-Focused Minority Preferences Are a More Effective Means than Race-Neutral Alternatives Available to Congress and the FCC*

This Court has required that a governmental body attempt some "consideration" of race-neutral alternatives before adopting a race-conscious program to benefit minorities. *Croson*, 109 S. Ct. at 728. Here, while it is clear that minority ownership preferences have succeeded in bringing more minority owners into broadcasting,[38] the evidence is equally strong that the FCC not only considered, but actually instituted, a number of race-neutral alternatives, and concluded that those alternatives were not enough in themselves. Thus, Congress is on sound footing in opting for focused race-conscious measures.

Before 1978, when it adopted the distress sale and tax certificate policies, the FCC had for a decade required licensees to institute equal employment opportunity programs,[39] and it also had required licensees to conduct discussions with significant groups in their communities, including minority leaders, to ascertain programming

[38] Over the past decade since the FCC's distress sale and tax certificate policies were instituted (during which time the comparative enhancement has also been in force), minority ownership in broadcasting has doubled, though it still remains unacceptably low. In 1978, less than 1% of commercial broadcast licenses were in the hands of minorities, *Taskforce Report* at 8-9, compared with the 2% or more of broadcast licenses held by minorities today. National Association of Broadcasters, *Minority Broadcasting Facts* at 6. According to the findings of the Congressional Research Service, at least 19.8% of all minority-owned stations were acquired through one of the three minority ownership preferences; the FCC's own figures indicate an even higher total. *CRS Report* at 41 & n.5, 45.

[39] *See Nondiscrimination in Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969); *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C.2d 766 (1968).

needs.[40] Moreover, for several decades before instituting the comparative hearing preference or any of its other minority preferences the FCC had imposed a variety of race-neutral restrictions on multiple ownership of broadcast stations.[41] The FCC was conscious in adopting its minority preference policies of the undesirability of attempting to force viewpoint diversity by more overt means, noting that "affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions."[42] Notwithstanding its earlier race-neutral efforts, the FCC concluded in 1978 "that the views of racial minorities continue to be inadequately represented in the broadcast media."[43] Thus, the minority preference policies came into being in the context of careful consideration of other alternatives and their inappropriateness or limited effectiveness.

B. *The Minority Ownership Preferences at Issue Represent the Least Burdensome Means of Achieving Congress's Goals*

Several decisions of this Court have indicated that any race-conscious plan to benefit minorities must avoid undue burdens on innocent parties. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 282 (1986) (opinion of Powell, J.); *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421, 481 (1986) (opinion of Powell, J.). Minority preferences in comparative hearings are comparable to the hiring goals discussed in *Wygant*, in that no potentially interested

[40] *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419 (1976). Formal ascertainment requirements for broadcasters were modified or lifted during the 1980s.

[41] These rules are presently embodied in 47 C.F.R. § 73.3555 (1989) (multiple ownership).

[42] *1978 Policy Statement*, 68 F.C.C.2d at 981.

[43] *Id.* at 980.

party can point to "settled expectations" disrupted by the award of the preference. 476 U.S. at 282-83 (opinion of Powell, J.). Prospective new broadcasters have no right to a license, while Congress and the FCC may deny a license on a variety of "public interest" grounds, *Red Lion*, 396 U.S. at 389-90, including the determination that licensing the frequency to another would better promote viewpoint diversity.

In opting for these discrete preferences, Congress has declined the far more burdensome alternative of displacing incumbent licenses in order to accommodate minority owners. The FCC has long granted incumbent licensees a renewal expectancy based on meritorious service, *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 805, an expectancy that is not overcome on the basis of any minority preference. To redistribute existing licenses to minorities would be far more akin to the layoffs condemned in *Wygant* for disproportionately burdening particular individuals. 476 U.S. at 282-83 (opinion of Powell, J.). Because the nexus that Congress has recognized between diversity of ownership and diversity of viewpoint is a prediction about average behavior, rather than a judgment about individual licensees, displacing incumbent licensees in favor of minorities might well give rise to constitutional objections that the present programs do not.

The opponents of these minority preferences grossly exaggerate their burden on third parties, relying on Judge Silberman's notion that each broadcasting station constitutes a unique business opportunity.[44] That argument does not reflect the nationwide character of the broadcasting industry; not only the major group owners, but countless smaller broadcasters as well, have acquired stations in several different markets because those stations are considered to be sound business investments.[45] While individuals new to broadcasting may well

[44] *Shurberg*, 876 F.2d at 917-19.

[45] This is true even of many successful minority broadcasters. *See Cook Inlet Testimony* at 9-10.

start in a single local market, if successful they frequently expand into other communities as opportunity permits. Certain advantages do accrue to local residents in the comparative hearing process, but there are no comparable barriers to the purchase of a station in another market. Judge Silberman's belief that each station constitutes a unique opportunity is inconsistent with industry experience.

Judge Silberman's analysis, moreover, is at odds with this Court's own precedent, which draws a crucial distinction between termination of a present benefit and denial of a potential one not yet acquired, where the individual has far less of an investment at stake. "Denial of a future employment opportunity is not as intrusive as loss of an existing job," as "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-83 (opinion of Powell, J.). *Fullilove* recognized that a "sharing of the burden" by all innocent parties who might bid for federal contracts was acceptable, in upholding Congress's minority business enterprise set-aside, 448 U.S. at 484 (opinion of Burger, C.J.), 514-15 (opinion of Powell, J.); *see also Wygant*, 476 U.S. at 280-81 (opinion of Powell, J.). And it is hard to see how the burden here, diffused among all individuals who might choose to enter broadcasting and precluding no one absolutely from acquiring a station, either through purchase or in a comparative hearing, is any greater. Judge Silberman's analysis, by assuming *a priori* that each station is unique, would create an insuperable barrier to any race-conscious program to encourage minority broadcast ownership.

C. *The Minority Preferences Here Are Not Overinclusive*

Because the minority preferences in broadcast ownership operate on a nationwide basis, they are clearly not overinclusive in extending their benefits to all racial minority groups that have suffered from societal discrimination, unlike the municipal set-aside program held un-

constitutional in *Croson*. 109 S. Ct. at 727-28. Regardless of the locale in which minorities seek to acquire broadcast stations, they must labor under the same financial disadvantages that are the present-day consequences of past societal discrimination. Moreover, those who wish to enter what is, after all, a nationwide industry cannot realistically hope to succeed by confining their efforts to particular geographic markets.[46]

D. *The Comparative Minority Preferences Are Administered in a Careful and Flexible Manner*

This Court's decisions indicate that race-conscious programs are more likely to be upheld where they are carefully administered so as to avoid misapplications and ensure that the legitimate underlying objectives are accomplished. *Fullilove*, 448 U.S. at 487-88 (opinion of Burger, C.J.). The minority preferences in comparative hearings are subject to "administrative scrutiny to identify and eliminate from participation" spurious minority-front applicants and others who are not *bona fide*, as in *Fullilove*, 448 U.S. at 487-88.[47] The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham minority applicants and frequently disqualifies such applicants or denies them credit for integration of ownership and management, thereby also eliminating the value

[46] Significantly, the minority business enterprise set-aside program in *Fullilove* defined eligible minorities as broadly as Congress and the FCC have done here, 448 U.S. at 454, yet it was sustained against facial overinclusiveness claims. *Id.* at 486-89 (opinion of Burger, C.J.).

[47] The FCC also entertains challenges to the *bona fide* nature of participants in distress sales, as evidenced by Shurberg's own unsuccessful attack on Astroline. *See* 876 F.2d at 906. Indeed, the FCC has made clear that wherever limited partnership structure are used by applicants claiming the benefits of the tax certificate or distress sale policies, "in order to avoid 'sham' arrangements, we will continue to review such agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)." *1982 Policy Statement*, 92 F.C.C.2d at 855.

of any minority preference.[48] Thus, Metro Broadcasting's complaints about the use of limited partnerships or other mechanisms by minority applicants need give rise to no fear of abuses.[49]

Minority enhancements in the comparative hearing process, while undoubtedly significant, clearly do not operate to deny whites any real chance of prevailing, as Metro Broadcasting's own statistics indicate.[50] The

[48] Numerous FCC decisions hold that the validity of an applicant's ownership structure can be tested as part of the comparative process, without any *prima facie* showing of bad faith by a competing applicant, in order to determine whether any nominally passive investors have in fact improperly played an active role in the applicant's creation or operations. *KIST Corp.*, 99 F.C.C.2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 F.C.C.2d 288 (1985), *aff'd sub nom. United Am. Telecasters v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986). *See also Hispanic Owners, Inc.*, 99 F.C.C.2d 1180 (Rev. Bd. 1985); *Berryville Broadcasting Co.*, 70 F.C.C.2d 1, 7 (Rev. Bd. 1978); *Henderson Broadcasting Co.*, 63 F.C.C.2d 419 (Rev. Bd. 1977). In *KIST*, the FCC's leading precedent on "sham" applications, both the Review Board and the Commission found that an applicant supposedly 95% owned by a black woman, and 5% by a white man, was unworthy of any credit for integration of ownership and management—and thus unqualified for any minority preference as well—in large part based on the nominal minority owner's lack of financial commitment. 95 F.C.C.2d at 186-87; 102 F.C.C.2d at 292-93 & n.11. *See also Northampton Media Assoc.*, 3 FCC Rcd. 5164 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 FCC Rcd. 3948 (Rev. Bd. 1988); *Susan S. Mulkey*, 3 FCC Rcd. 590 (Rev. Bd. 1988); *Newton Television Limited*, 3 FCC Rcd. 553 (Rev. Bd. 1988); *Magdeline Gunden Partnership*, 3 FCC Rcd. 488 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 2 FCC Rcd. 6124 (Rev. Bd. 1987); *Pacific Television, Ltd.*, 2 FCC Rcd. 1101 (Rev. Bd. 1987); *Payne Communications, Inc.*, 1 FCC Rcd. 1052 (Rev. Bd. 1986).

[49] Brief for Petitioner Metro Broadcasting, Inc. at 22.

[50] Metro Broadcasting's own tally of cases decided between 1987 and 1990 demonstrates that white males prevailed in comparative hearings in 26 out of 79 (incorrectly stated as 78) instances, while white females prevailed in 11 instances. Minorities (including minority females) prevailed in only 42 of the 79 cases, little more than half. Brief for Petitioner Metro Broadcasting, Inc. at 23-25 & n.59.

[Continued]

FCC's comparative enhancement for minorities cannot be regarded as a set-aside or quota. In the first place, it plays no role at all unless no other party has a clear advantage in the quantitative percentage of integration of prospective station owners into management—an advantage that can be attained with a difference of as little as 12.5%,[51] and is frequently decisive. Moreover, even where there is no clear difference among the competing parties in quantitative integration, minority ownership is only one factor among the several "qualitative" enhancement factors weighed by the FCC to determine which applicant will provide the "best practicable service." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d at 394-99.[52] For example, local residence,

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[50] [Continued]

This enumeration in fact greatly overstates Metro Broadcasting's argument, since it does not reveal, in the cases where minorities prevailed, that they frequently did so not on the basis of the minority enhancement but on other non-racial factors such as a clear quantitative advantage in integration of ownership into management, demerits assigned to rivals for other media interests, comparative coverage, environmental impact, or the disqualification of rivals prior to any comparative evaluation. In fact, half of the cases cited by Metro Broadcasting where minorities prevailed (21 out of 42) were decided on factors other than the qualitative enhancements. Of the remaining 21 cases that were decided for minorities on the qualitative factors, in only *three* was minority and/or female status responsible for the result, while in another eight minority and/or female status helped to tip the balance in the applicant's favor together with other factors. Thus, minority and gender preferences can only be said to have influenced the award of a license to a minority applicant in about 14% of the FCC's recent comparative proceedings.

[51] *New Continental Broadcasting Co.*, 88 F.C.C.2d 830, 850 (Rev. Bd. 1981), *remanded on other grounds*, 93 F.C.C.2d 1275 (1983).

[52] Galaxy Communications is incorrect in suggesting that the FCC's process is flawed because race and ethnicity are the only factors the FCC considers in the diversity analysis. Brief of Galaxy Communications, Inc. as Amicus Curiae in Support of Petitioner at 8. All of the general qualitative enhancements—minority (and female) status, local residence, prior status as a daytime AM station

[Continued]

in the FCC's recent case law, is considered of equal strength to minority ownership,[53] so that a local resident with an additional enhancement for civic participation or past broadcast experience can well tip the balance in his favor against a nonresident minority. Thus, the comparative enhancement is quite similar to the consideration of race as one element in achieving a diverse student body that Justice Powell found permissible in *Bakke*, 438 U.S. at 314-19 (opinion of Powell, J.), as the D.C. Circuit concluded in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 613-16 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985).

Because the FCC's comparative process does not partake of the rigidity of a set-aside or quota system, there is no comparable need for an administrative waiver process, as in *Fullilove*. *See* 448 U.S. at 487 (opinion of Burger, C.J.); *see also Croson*, 109 S. Ct. at 728-29. The FCC has no constitutional obligation to consider whether particular minority owners will contribute to diversity of minority viewpoints in each individual case—or whether particular nonminority owners could also make some contribution to informing the public of minority concerns. Imposing such a requirement, in all likelihood, would confront the FCC with a bidding war of "minority-targeted" programming and "minority-favorable" political beliefs highly questionable under the First Amendment. Because the direct policing of viewpoints raises

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[52] [Continued]

owner, civic participation, and past broadcast experience—are considered and weighed at the same time in the comparative process, after it has been determined that there is no clear difference in quantitative integration of ownership and management among competing applicants, as all of these factors are thought relevant to the licensee's ability to provide the "best practicable service" under the public interest criterion. All of these factors reflect to some extent the diverse backgrounds that owners may bring to their new stations.

[53] *Radio Jonesboro, Inc.*, 100 F.C.C.2d 941, 945-46 (1985); *Linda Crook*, 3 FCC Rcd. 354 (1988).

serious First Amendment problems, "it is upon ownership that public policy places primary reliance with respect to diversification of content," and ownership "historically has proven to be significantly influential with respect to editorial comment and the presentation of news." [54]

CONCLUSION

For the reasons stated, the minority preference policies implemented by the Federal Communications Commission should be held to be constitutional, and the decision of the court of appeals herein should be affirmed.

Respectfully submitted,

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[54] *TV 9*, 495 F.2d at 938.